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# Failures of the American Adversarial System to Protect the Innocent and Conceptual Advantages in the Inquisitorial Design for Investigative Fairness

Robert P. Mosteller

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# Failures of the American Adversarial System to Protect the Innocent and Conceptual Advantages in the Inquisitorial Design for Investigative Fairness

## **Cover Page Footnote**

International Law; Commercial Law; Law

# Failures of the American Adversarial System to Protect the Innocent and Conceptual Advantages in the Inquisitorial Design for Investigative Fairness

*Robert P. Mosteller†*

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† J. Dickson Phillips Distinguished Professor of Law, University of North Carolina School of Law. I wish to thank Michele Caianiello, Michael Corrado, Jacqueline Hodgson, Jeff Powell and particularly Barbara O'Brien for their suggestions and helpful comments regarding an earlier draft of this Article and Cooper Strickland for his research assistance.

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## I. Introduction

Judicial systems are asked to satisfy multiple goals, including retribution, deterrence, factfinding, and moral education, but the emphasis placed on those various goals may sometimes differ from system to system. Specifically, an international criminal tribunal which decides cases involving gross violations of human rights may properly emphasize goals that are not at the forefront of domestic criminal justice systems, such as state systems within the United States.<sup>1</sup> Such international courts often perceive their responsibilities to include developing an historical account of events and teaching a sense of accountability.<sup>2</sup> As to differing goals, comparison of the effectiveness of systems is of little interest.

In this Article, I focus on several basic goals shared by judicial systems and address the issue of which criminal justice system—the adversarial or the contemporary continental inquisitorial system—better satisfies the common and often central goal of accurate factfinding. Because my relative advantage in familiarity is with the American adversarial system, I will spend the majority of my effort critiquing the inadequacies of the American adversarial model with regard to accuracy, with an emphasis on avoiding unjust convictions. My specific point of concentration for analysis of the American adversarial system is its demonstrated failings in convicting the innocent, as shown by recent exonerations, which often occur after the innocent

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<sup>1</sup> See, e.g., Mirjan Damaška, *Problematic Features of International Criminal Procedure*, in *THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE* 175, 177 (Antonio Cassese ed., 2009).

<sup>2</sup> *Id.*

defendant has spent many years in prison.<sup>3</sup>

These cases were typically exonerations based on evidence acquired through post-conviction DNA testing. These revelations often occurred as the result of the happenstance that many innocent defendants were convicted before DNA identification technology matured, but their charged crimes—principally rape and murder—left behind dispositive biological trace evidence.<sup>4</sup> This evidence had been gathered by investigators and, in the cases of the fortunate, preserved and reexamined with new technology. We cannot know how many more defendants were wrongfully convicted since for many, no trace evidence was gathered or retained to be available for subsequent testing. As a matter of logic, many more were falsely convicted than the several hundred of which we are aware.<sup>5</sup>

Wrongful convictions are recognized as the most serious type of system error and have great salience in the Anglo-American system of justice.<sup>6</sup> The critical importance the public places upon

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<sup>3</sup> See generally, Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523 (2005) (examining 340 exonerations the authors were able to document during the period from 1989 through 2003); Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55 (2008) (examining what the author describes as the first 200 individuals exonerated by post-conviction DNA testing in the U.S.).

<sup>4</sup> See Garrett, *supra* note 3, at 75-76; Gross et al., *supra* note 3, at 528-332.

<sup>5</sup> See Garrett, *supra* note 3 at 127-128.

<sup>6</sup> In comparatively examining the basic features of the adversarial and the inquisitorial systems, Professor Damaška recognized the obvious point, which is not frequently noted in most contemporary examinations with erroneous convictions, that maximizing accuracy and the avoidance of convicting the innocent are conceptually distinct concerns. See Mirjan Damaška, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 506, 508 (1973). As Damaška stated, “factfinding precision in the total volume of criminal cases may . . . even be decreased.” *Id.* Clearly, higher barriers to conviction do help to minimize erroneous convictions of the innocent, but they also increase erroneous acquittals of the guilty as well.

Professor Ronald Wright has argued that publicity regarding wrongful convictions revealed by DNA testing could provide a popular basis for public defender funding “framed as an investment in accuracy.” See, e.g., Ronald F. Wright, *Parity of Resources for Defense Counsel and the Reach of Public Choice Theory*, 90 IOWA L. REV. 219, 261 (2004) (effectively equating the two concerns, which is understandable given the predominant importance placed on avoiding unjust convictions in contemporary discourse). These conceptually inconsistent goals may, however, coalesce to some degree as societal values are weighed in the process that treats false convictions (known

these errors can be seen in the way the public has responded with great concern to DNA exonerations.<sup>7</sup> One of the most troubling points many of these exonerations demonstrated was that despite the criminal justice system's theoretical commitment to special vigilance against those types of errors, even in crimes subject to capital punishment, cases that presumably received the best process the American system can provide, the innocent have been convicted.<sup>8</sup>

Of course, no human factfinding system will be perfect. A system that handles millions of cases, and is staffed by hundreds of thousands of individuals spread throughout this vast country, will almost inevitably produce a sizeable number of errors. However, I believe a substantial number of these errors can be traced to clear flaws in the design of the American criminal justice system and are not the result of ordinary human fallibility.

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as Type I errors or false positives) as more significant than erroneous acquittals (Type II errors or false negatives). See Eyal Zamir & Barak Medina, *Law, Morality, and Economics: Integrating Moral Constraints with Economic Analysis of Law*, 96 CAL. L. REV. 323, 380 (2008) ("Incorporating a deontological constraint against (risking) false convictions may thus yield a more satisfactory analysis."). The strong western commitment to err on the side of protecting the innocent is captured in the adage that it is better that ten guilty men be acquitted than one innocent man be convicted, which is found in the English writings of both Matthew Hale and William Blackstone. See SIR MATTHEW HALE, *PLEAS OF THE CROWN: A METHODICAL SUMMARY* 289 (1678); 4 WILLIAM BLACKSTONE, *COMMENTARIES* \*352; but see Ronald J. Allen & Larry Laudan, *Deadly Dilemmas*, 41 TEX. TECH. L. REV. 65 (2008) (championing Jeremy Bentham's view that society tends to overly value the danger of unjust convictions and arguing accuracy in preventing unjust convictions should be given greater prominence in reforms).

<sup>7</sup> See generally FRANK R. BAUMGARTNER, SUZANNA L. DE BOEF & AMBER E. BOYDSTON, *THE DECLINE OF THE DEATH PENALTY AND THE DISCOVERY OF INNOCENCE IN AMERICA* (2008) (describing how the stories of exonerations of those on death row through DNA transformed American attitudes toward the death penalty).

<sup>8</sup> See Gross et al., *supra* note 3, at 529. Of 340 exonerations from false convictions, seventy-four were innocent defendants exonerated in cases that involved a sentence of death. The reason for the high number of innocent defendants exonerated in capital cases may be because more innocent defendants are actually falsely convicted in murder cases, as well the level of attention and emphasis placed on exonerating those falsely convicted in such cases. *Id.* at 532. See also Garrett, *supra* note 3, at 91–92 (noting that among the first 200 individuals exonerated by DNA that fourteen had been convicted of capital crimes). This observation extends also to those crimes that are subject to capital punishment. Even the Supreme Court has taken notice of the number of innocent defendants wrongly convicted of capital crimes. Many of these cases were decided upon weak evidence in the difficult cases of proving stranger homicide. *Id.*

The specific international focus of this Article is in exploring the possibility that differences in the institutional identification of those responsible for investigation in the inquisitorial criminal justice system may alleviate a key structural impediment to accuracy in the American adversarial system in protecting the innocent. In the first two parts of this Article, I examine failings within the American criminal justice system that prevent the American system from achieving the maximum potential of the adversarial model.

In Part I, I discuss two major failings of the American criminal justice system.<sup>9</sup> Most fundamentally, state systems, where the vast majority of criminal cases are tried, inadequately fund defense representation for indigent defendants, who constitute the bulk of those charged.<sup>10</sup> That effectively means that the prosecution lacks an effective opponent to challenge its allegations and evidence.<sup>11</sup> A second failure is to provide full discovery in criminal cases.<sup>12</sup> Affording full discovery in the criminal justice system could at least in part ameliorate the limitations of defense resources to investigate and present the facts.<sup>13</sup> These features of the American criminal justice system are widespread, persistent, and fundamental.

In Part II, I examine the role of the prosecutor. An essential feature of American justice is the recognized duty of the

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<sup>9</sup> While not discussed in this Article, I recognize that the American criminal justice system arguably has other equally serious basic problems, such as its extraordinary reliance on the plea bargaining process. See, e.g., Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463 (2004) (discussing the evils of plea bargaining but recognizing its important functions and likely longevity). However, I contend the lack of adequate counsel in combination with the failure of the system to compensate for inadequate counsel is significantly more damaging to the cause of justice than are the abuses flowing from excessive reliance on guilty pleas.

<sup>10</sup> See generally, Mary Sue Backus, *The Adversary System is Dead; Long Live the Adversary System: The Judge as the Great Equalizer in Criminal Trials*, 2008 MICH. ST. L. REV. 945, 953-61 (2008) (describing the failings of the state system due to inadequate funding).

<sup>11</sup> See generally *id.* at 975-76 (citing William J. Brennan, Jr., *Criminal Prosecution: Sporting Event or Quest For Truth?*, 1963 WASH. U. L.Q. 279, 285 (1963)). The process of discovery is the chance to level the playing field between the defense and the prosecution.

<sup>12</sup> See *id.* at 975-77.

<sup>13</sup> See *id.*

prosecutor “to do justice.” This duty could help offset the defense inadequacies discussed in Part I. However, despite its potential, the duty of the prosecutor “to do justice” does not effectively compensate for those failures because the prosecutor cannot fully shed the adversarial mantle. Moreover, in modern criminal prosecutions, the prosecutor has effectively become not only an advocate but also the adjudicator in determining the resolution of the case through the omnipresent practice of plea bargaining as a substitute for trial.<sup>14</sup> In addition, not only theoretical analysis, but also the insightful new application of recognized psychological theory and empirical research regarding the biasing effect of the American prosecutor’s role to try the case as an advocate, demonstrate that he or she cannot perform the fact-gathering role neutrally as a consequence of that role’s unconscious distortions of rational evaluation and even accurate memory. I propose reforms, some of which are obvious, for each of these failings.

In Part III, I examine the clear suggestion of new psychological scholarship that the inquisitorial, judicially-led prosecution is theoretically superior to the present American prosecutorial structure in ensuring fairness and accuracy, which is particularly important when protecting the innocent is given primacy.<sup>15</sup> The issue is whether the ultimate task assigned to inquisitorial judges—to decide the guilt of the defendant fairly—enables them to gather and evaluate evidence more neutrally than American prosecutors, whose ultimate role is to persuade the factfinder as a partisan advocate.<sup>16</sup>

## **II. The Failure of the American Adversarial System to Have a Second Advocate, the Defense**

### *A. Inadequate Funding for Indigent Defense, Particularly Indigent Defense Outside the Federal System*

Despite the constitutional command that counsel be provided

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<sup>14</sup> See, e.g., Bibas, *supra* note 9.

<sup>15</sup> See Dan Simon, Doug Senstrom & Stephen J. Read, *Adversarial and Non-Adversarial Investigations: An Experiment* (May 15, 2009), available at <http://ssrn.com/abstract=1401723>.

<sup>16</sup> See *id.*



for indigents in felony cases,<sup>17</sup> many have noted the lack of funding for state defenders.<sup>18</sup> The American Bar Association has prepared two major reports on indigent funding, nearly twenty years apart, revealing essentially the same fundamental funding inadequacies in the vast majority of states.<sup>19</sup> In 1982, after an extensive survey and analysis of funding in forty states, the Standing Committee on Legal Aid and Indigent Defendants summarized the state of representation as follows: "Overall, there is abundant evidence in this report that defense services for the poor are inadequately funded. As a result, millions of persons who have a constitutional right to counsel are denied effective legal representation."<sup>20</sup>

In 2004, the ABA reexamined the situation and found

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<sup>17</sup> See *Gideon v. Wainwright*, 372 U.S. 335 (1963) (mandating that counsel be provided for all indigents in felony cases in order to comply with the Sixth Amendment).

<sup>18</sup> See, e.g., Backus, *supra* note 10, at 952-61 (summarizing and citing the consistent and uniform analysis of the state indigent defense systems as continually underfunded); see generally Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, a National Crisis*, 57 HASTINGS L.J. 1031, 1045-1053 (2006) ("By every measure in every report analyzing the U.S. criminal justice system, the defense function for poor people is drastically underfinanced."); Norman Lefstein, *In Search of Gideon's Promise: Lessons from England and the Need for Federal Help*, 55 HASTINGS L.J. 835, 845-857 (2004) (summarizing that "overall this nation's systems for providing counsel to the indigent are still very inadequate" and detailing the basis for that conclusion). This literature also includes numerous articles recounting injustices in individual cases that resulted from inadequate representation, including cases involving the death penalty. See, e.g., Stephen B. Bright, *Neither Equal Nor Just: The Rationing and Denial of Legal Services to the Poor when Life and Liberty Are at Stake*, 1997 ANN. SURV. AM. L. 783 (1997); Rodney Uphoff, *Convicting the Innocent: Aberration of Systemic Problem?*, 2006 WIS. L. REV. 739, 748-79 (2006).

<sup>19</sup> In the middle of this time period, an ABA committee examined funding and reached similar conclusions. See ABA SPECIAL COMM. ON CRIMINAL JUSTICE IN A FREE SOC'Y, CRIMINAL JUSTICE IN CRISIS 37 (1988) (the ABA Criminal Justice Section's Special Committee on Criminal Justice in a Free Society reporting that "defense representation is too often inadequate" because "we, as a society, [are] depriving the system of the funds necessary to ensure adequate defense services"); A.B.A. STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS, GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE 7 (Dec. 2004) [hereinafter ABA Report 2004].

<sup>20</sup> NORMAN LEFSTEIN, A.B.A. STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS, CRIMINAL DEFENSE SERVICES FOR THE POOR: METHODS AND PROGRAMS FOR PROVIDING LEGAL REPRESENTATION AND THE NEED FOR ADEQUATE FINANCING 2 (1982). This report was prepared in a cooperative effort between the ABA committee and the National Legal Aid and Defender Association. *Id.*

essentially the same woeful lack of funding in addition to problems of delivery of these limited resources. It stated:

Too often when attorneys are provided, crushing workloads make it impossible for them to devote sufficient time to their cases, leading to widespread breaches of professional obligations. To make matters worse, exceedingly modest compensation deters private attorneys from performing more than the bare minimum required for payment. Further, the structure of indigent defense systems often means that judges and/or state and county officials control the attorneys, thereby denying them the professional independence afforded to their prosecution counterparts and to their colleagues retained by paying clients.<sup>21</sup>

The impact of the failure of states and localities to fund indigent defense adequately removes an essential ingredient of the adversary system, and in a massive number of cases there is no effective opponent to the prosecution. Indeed, it alters the basic character of American justice from its essential adversarial design. As the Supreme Court stated, “[t]he very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free.”<sup>22</sup>

In the United States, over 80% of those charged with felonies are indigent.<sup>23</sup> In addition, many of the others judged not to be indigent under the varying standards used<sup>24</sup> are no doubt of modest means and frequently receive marginal representation with little or no investigation to develop evidence to challenge the factual picture presented by the prosecution.<sup>25</sup> Also, although federal

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<sup>21</sup> See ABA Report 2004, *supra* note 19, at 7.

<sup>22</sup> See *Herring v. New York*, 422 U.S. 853, 862 (1975).

<sup>23</sup> See Uphoff, *supra* note 18, at 748.

<sup>24</sup> See *id.* at 748-49.

<sup>25</sup> See *id.* at 781. In Part III of this Article, I discuss the theoretical superiority of the judicially supervised investigation under the inquisitorial model. That superiority could be swamped by the increased accuracy gained if the finder of fact were presented with more evidence, albeit adversarial motivated evidence. Due to the inadequacy of defense funding, the potential compensating advantage of more evidence, some of it provided by the defense, is generally lost. As discussed in Part II, the American prosecutor, who has the resources to conduct a thorough investigation and produce a full display of the evidence, is impaired by unconscious biases even to perceive all the

criminal law is expanding, criminal justice remains the responsibility of states and localities predominantly, rather than the responsibility of the federal criminal system.<sup>26</sup> As measured by those incarcerated, 87.5% of inmates are confined in state prisons, thus only 12.5% are confined in the federal system.<sup>27</sup> When those housed in jails, which are typically the responsibility of localities rather than the states, are also included, the percentage accounting for state and local incarcerations increases to 91.4%, and the federal percentage dips to 8.6%.<sup>28</sup>

This basic failure of our purported adversarial system to provide adequately paid and supported defense advocates has frequently been noted.<sup>29</sup> However, I believe there is a sound reason to consider it the most serious challenge to justice in the United States. Most procedural protections granted in landmark Supreme Court opinions require the assistance of a skilled lawyer to develop and assert the rights effectively.<sup>30</sup> Many defenses can

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evidence that is potentially available to exculpate and therefore defeat the case the prosecutor is charged with developing. As discussed in Part III, despite the conceptual superiority of more neutral judicial investigation that is part of the French inquisitorial system, common social bonds and institutional affiliation between judicial officers who serve as prosecutors and other judicial officers who evaluate the case as the *juge d'instruction* tends to undermine neutrality. See JACQUELINE HODGSON, *FRENCH CRIMINAL JUSTICE: A COMPARATIVE ACCOUNT OF THE INVESTIGATION AND PROSECUTION OF CRIME IN FRANCE* 223 (2005). The French inquisitorial system also marginalizes the defense, and therefore may reduce even further the potential for production of additional helpful information at the important pre-trial stage. *Id.* at 222.

<sup>26</sup> See Heather C. West & William J. Sabol, *Prison Inmates at Midyear 2008 Statistical*, BUREAU OF JUSTICE STATISTICS 3, tbl.2 (Mar. 2009), available at <http://www.ojp.jusdoj.gov/bjs/abstract/pim08st.htm> (last updated Apr. 8, 2009). From the end of 2000 through mid-year 2008, the federal prison population grew faster than the state prison population in general, with a percentage of change of 38%, and the federal system passed both those of Texas and California to house the largest prison population at the end of the period. *Id.* In terms of all inmates held in state or federal prisons or local jails, the increase of those held in federal prisons was from 7.2% to 8.6% (percentage change of 19%). *Id.* at 16, tbl. 15.

<sup>27</sup> See *id.* at 3, tbl. 2 (reporting that the total federal and state prison population was 1,601,584 and the federal prison population was 201,142).

<sup>28</sup> See *id.* at 3, tbl.2, and 16, tbl.15 (reporting that the total held in federal or state prisons or local jails was 2,310,984 and those in federal custody was 201,142, the federal prison population being 198,402).

<sup>29</sup> See, e.g. Rodney Uphoff, *Foreword, Symposium: Broke and Broken: Can We Fix Our State Indigent Defense System?*, 75 MO. L. REV. 667 (2010).

<sup>30</sup> For example, the right to a trial by jury, to present a defense, and to confront

be independently recognized and accepted by prosecutors, but most cases proceed to the charging stage because of the apparent guilt of the defendant, and the complexity of the defense or ambiguity of the facts.<sup>31</sup> This difficult environment requires skilled development of the evidence and the ability and resources to bring them before the finder of fact in an understandable and persuasive form. Without adequate assistance of counsel and supporting services, much of what the American justice system prizes in terms of rights, fairness, and accuracy simply fails to materialize.<sup>32</sup>

Thus, the failure to provide adequate representation, which I believe is an uncontestable fact for a large percentage, if not a majority, of those charged with crimes in the United States, should be among the most prominent issues in criminal justice circles and in academic literature. However, it is not. One reason may be that to protest the situation is the equivalent of “tilting at windmills.” As Professor Darryl Brown states, “[f]orty years after *Gideon v. Wainwright*, this political limit on defense counsel [underfunding] is a fixed component of criminal justice; underfunding of defense will not change except at the margins.”<sup>33</sup> I suspect that another reason indigent counsel underfunding in the states has not received the degree of attention it deserves as a truly fundamental challenge is because the federal system generally provides much better

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witnesses have little meaning in most cases for most defendants without the assistance of skilled counsel.

<sup>31</sup> See generally Robert P. Mosteller, *Why Defense Attorneys Cannot, But Do, Care About Innocence*, 50 SANTA CLARA L. REV. 1, 11 (2009) (stating that assumption of guilt appears to be the premise under which most criminal cases operate).

<sup>32</sup> Cf. William Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 75 (1997) (“*Gideon* and the reasonable doubt rule are essential to any adversarial system that takes accuracy rather seriously.”); Robert P. Mosteller, *Protecting the Innocent: Part of the Solution for Inadequate Funding for Defenders, Not a Panacea for Targeting Justice*, 75 MO. L. REV. 931 (2010) (arguing that effective counsel is critical to protecting the large class of innocent defendants who lack conclusive proof of their innocence).

<sup>33</sup> See Darryl K. Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 CALIF. L. REV. 1585, 1590 (2005) (making this assertion and linking it to the legislative decision to limit defense counsels’ effectiveness because of representation of guilty clients’ interests and lack of focus on accuracy in adjudication).

funding in comparison.<sup>34</sup> Most major American academics are concerned primarily, if not exclusively, with the federal criminal system.<sup>35</sup>

*B. The Failure of the American Criminal Justice System to Compensate for Inadequate Defense Resources through Full Disclosure of the Prosecutor's Case to Facilitate its Testing at Trial, In the Rare Instance When that Event Occurs*

The inadequate funding of most indigent defenders, even if not treated with the alarm it merits, is a documented reality that would be difficult to remedy by the states even if correction were

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<sup>34</sup> See Inga L. Parsons, "Making it a Federal Case": A Model for Indigent Representation, 1997 ANN. SURV. AM. L. 837, 840 ("During these conversations I would think how lucky I was to be in the federal system where the culture of lawyering was based on traditional notions of adversarial advocacy and manageable caseloads"). I have indicated an allocation system that attempted to allocate services in line with what a lower middle class individual would secure with their own funds. See Mosteller, *supra* note 31, at 10. Even this relatively generous funding in comparison to other indigent support is for many lawyers below their ordinary market rate. See Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 881, 882 n.55 (2009) (citing effort to increase pay rates for appointed attorneys in the federal system because the existing rate does not even offset overhead costs). Professors Marc Miller and Ronald Wright are clear exceptions in treating state criminal adjudications as central to understanding criminal procedure. See Robert Weisberg, *A New Legal Realism for Criminal Procedure*, 49 BUFF. L. REV. 909 (2001) (describing the new casebook on criminal procedure as "the most original criminal procedure book in many years" because of its focus on state applications and decisions rather than Supreme Court decisions).

<sup>35</sup> See Barkow, *supra* note 34, at 870, 873, n.15 (beginning the article by noting the recent growth of the federal prison system population and then focusing exclusively on the organization of the prosecutor's office in the federal system). The undue attention that I believe American academics pay to federal criminal prosecutions and the workings of the federal system is apparently not a phenomenon unique to the United States. Professor Jacqueline Hodgson believes that similar skewed attention occurs in England and Wales, where the Crown Court jury trial is frequently treated as the norm even though most cases are handled without juries by lay judges in magistrate courts, and in France, where the principal attention is given to *instruction*, even though this procedure is used in less than 5% of French criminal cases. See E-mail from Jacqueline Hodgson, to Robert Mosteller & Michael Corrado (Nov. 11, 2009, 7:59 EST) (on file with author) (describing how in both of these systems most emphasis is placed on the relatively rare procedures); HODGSON, *supra* note 25, at 209 (noting that less than 5% of cases are handled in France through the *instruction*).

politically popular.<sup>36</sup> This is because of the significant impact that remedy would have on state and local budgets, which are already facing serious deficits. Some potentially compensating procedural reforms are not costly to public funds but still not embraced. I examine here the important but incomplete aid to fairness to the defense that would be provided by full discovery of the prosecution's evidence.

In contrast to the inquisitorial model, American trials do not occur based on the developed investigative dossier. Instead, they proceed from a prosecutor-developed file, disclosed to the factfinder as counsel chooses to present it, and a defense-developed file, also disclosed according to defense counsel's direction. Exchange of information between adversaries from their respective investigative files occurs before trial in the procedure termed "discovery" in the American adversarial system. Inadequacies in defense preparation could be offset by disclosures from the prosecution in many cases, effectively reducing some of the resource disparities faced by the defense by providing investigative information.

For cases resolved without trial through guilty pleas, inadequate resources for the defense have an effect both on the level of effort and on the amount of scrutiny the charge receives before resolution that is not subject to amelioration through formal discovery. Unfortunately, resolution by guilty plea occurs in the vast majority of cases, and trials in criminal cases are rare events in American jurisdictions.<sup>37</sup> Even in those rare situations when a trial occurs, which should involve disproportionately the highest percentage of innocent defendants, inadequate defense support

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<sup>36</sup> Professor Darryl Brown has noted the lack of popularity with state legislatures of the goal of providing an effective defense to all those accused of crime. See Brown, *supra* note 33, at 1590. In this time of budget shortfalls, cash strapped states and localities must choose which important services to limit or eliminate. It is hard to believe that providing indigent defense services will win out in the competition for scarce dollars when competing against such popular and socially valuable services as public schools, medical care, and highways, to name a few.

<sup>37</sup> Only about 10% of criminal cases in the entire U.S. are resolved by trial, and in the federal system, the trend in recent years has pushed that rate down to less than half the national average. See Ronald Wright & Marc Miller, *Honesty and Opacity in Charge Bargains*, 55 STAN. L. REV. 1409, 1415 (2003) (noting the national rate of 90% guilty pleas in resolving cases and the recent increase in the federal guilty plea percentage that increased approximately 10% from 85.4% in 1991 to 96.6% in 2001).

continues to have largely the same significant impact on fairness. Other than the in-court performance of counsel, which even if exemplary is usually not an adequate substitute for a well-developed case, resource inadequacy is one of the factors that most impairs accurate resolution of a case.

Even during a trial, the unnecessary impediment of limited discovery provided in criminal cases in most American jurisdictions stands in the way of the adversarial model reaching its potential promise. A prominent recent American spectacle, the Duke lacrosse case, brought disrepute to aspects of the criminal justice system when three members of the Duke University lacrosse team were indicted on rape charges for an offense that clearly never occurred.<sup>38</sup> One of the major reasons the spectacle did not produce a systemic debacle was that North Carolina, the state in which the case occurred, had recently enacted a broad system of discovery in criminal cases.<sup>39</sup> Those provisions were critical to the exoneration of the defendants and the disbarment of the prosecutor who secured the indictments and carried the prosecution forward.<sup>40</sup>

In contrast to the extensive discovery that is part of civil litigation, American criminal procedure traditionally provides only limited discovery in criminal cases. Given that the “stakes” are often higher in criminal cases, this state of affairs appears backward. However, more restrictive criminal discovery has been historically justified by three main arguments: first, broader discovery permits criminal defendants to develop effective perjured testimony to counter the newly-revealed details the prosecution will offer; second, broad disclosures will reveal identifying information regarding prosecution witnesses and will

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<sup>38</sup> See Robert P. Mosteller, *The Duke Lacrosse Case, Innocence, and False Identifications: A Fundamental Failure to “Do Justice,”* 76 *FORDHAM L. REV.* 1337, 1341–47 (2007) (describing the event and the basis for the decision of the North Carolina Attorney General to dismiss charges and declare the defendants innocent).

<sup>39</sup> See Robert P. Mosteller, *Exculpatory Evidence, Ethics, and the Road to the Disbarment of Mike Nifong: The Critical Importance of Full Open-File Discovery*, 15 *GEO. MASON L. REV.* 257, 262–76 (2008) (describing the chain of events that produced the broad criminal discovery statute in North Carolina).

<sup>40</sup> See *id.* at 285–318 (2008) (describing the impact of the availability of full open-file discovery on the progression of the case leading to dismissal of charges against the defendants and the disbarment of the prosecutor).

permit witness intimidation; and third, because the defendant is protected by the Fifth Amendment to the United States Constitution, reciprocal disclosures required of the defense will inevitably be more limited.<sup>41</sup> In essence, the argument against further discovery is that broader discovery for the criminal defendant would tilt the balance of advantage, which already favors the defendant as a result of various procedural protections, too far in the defense's favor.<sup>42</sup>

Recently enacted discovery reforms have made North Carolina's criminal discovery system among the most liberal in the country, and these provisions provide substantially more extensive discovery to the defense than does the federal system.<sup>43</sup> The changes in North Carolina occurred because of a widely publicized case involving apparently serious prosecutorial misconduct in the withholding of exculpatory evidence.<sup>44</sup> A defendant sentenced to death but likely innocent was spared execution because of exculpatory evidence that was revealed by a recently-enacted, expansive discovery statute that was limited to death penalty cases, which the legislature then broadened to cover all felony prosecutions.<sup>45</sup> The national trend is in the direction of broader criminal discovery, but discovery in criminal cases remains restricted in comparison to its civil counterpart. There is no indication that rapid expansion of criminal discovery will occur

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<sup>41</sup> See generally, 5 WAYNE R. LEAVE ET AL., CRIMINAL PROCEDURE § 20.1(b) (3d ed. 2007).

<sup>42</sup> See Mosteller, *supra* note 39, at 273 (describing the justifications for narrow criminal discovery, including the fear that greater discovery will add to the defendant's existing procedural advantages, such as the requirement of proof beyond a reasonable doubt, and would be an advantage to the defense in litigation).

<sup>43</sup> See LAFAYE ET AL., *supra* note 41, § 20.1(c), at 355 & n.48, § 20.2(b), at 365–66 & n.34, at 367 & n.41 (placing North Carolina's criminal discovery statute among the five that are the most expansive and are in line with the scope of the third edition of the ABA Standards and noting that North Carolina goes further than any other jurisdiction in authorizing defense discovery from the prosecution but that in other areas, Florida's provisions provide broader discovery).

<sup>44</sup> See Mosteller, *supra* note 39, at 262–76 (describing the facts of the Alan Gell case and the failure to disclose numerous items of exculpatory evidence in the initial trial, the limited disciplinary action taken against the prosecutors in the initial trial, the quick acquittal on retrial, and the discovery reforms that provide “full open-file discovery” to all felony defendants that was enacted as a result of the case).

<sup>45</sup> *Id.*



in the near future.

In the preceding subsection, I noted that the federal system generally provides reasonably adequate funding to indigent defense services and speculated that that state of affairs might lessen academic attention to the persistent and important problem with funding in the states. With regard to discovery, the federal system is not taking the lead in its expansion. This is likely because many more defendants in federal court, which includes a disproportionately high percentage of white-collar crime, organized crime, and terrorism prosecutions,<sup>46</sup> fit the most common justifications for limited discovery. Nevertheless, the fact that criminal discovery in the federal system is limited and is likely to remain that way is a reason to presume that expansion in the states will, at best, move slowly.

Restrictive discovery is not inconsistent with the idea of an adversarial model and indeed it is fully consistent with each side establishing and presenting its own case. It is, however, inconsistent with a fair and effective adversarial model if one of the two adversaries is woefully under-resourced, as is the situation in what is likely a clear majority of criminal cases and even felony prosecutions in the United States. Broad discovery could be a partial offset to inadequate defense resources as the defense benefits from the investigative resources available to the prosecution, and the present limitations on criminal discovery exacerbate the consequences of inadequately funded indigent defenders. Without adequate resources, denying the defense full access to the prosecution's files and those of the investigative agencies within the executive branch denies the opportunity for a full and effective adversarial testing of the facts. This problem plagues cases resolved either by a plea of guilty or by a trial. Indeed its impact may be most damaging to the accurate resolution of those cases that are resolved short of a trial because at trial much of the prosecution's evidence is exposed to open scrutiny as

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<sup>46</sup> See, e.g., A. Kenneth Pye, *The Defendant's Case for More Liberal Discovery*, 33 F.R.D. 47, 91 (1963) (acknowledging that the dangers of perjury, bribery, and intimidation are greatest with respect to expanded discovery in organized crime cases); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 525 (2001) (noting that the biggest areas of expansion of federal criminal law in the 1970s and 1980s were organized crime and white collar crime).

it is presented to the finder of fact.<sup>47</sup>

The American adversarial system has another important response to the flaw in adversarial testing produced by defense resource inadequacy. Unlike the defense counsel, the prosecutor is not envisioned as acting as an unconstrained advocate of his or her cause. Instead, by tradition, ethical command,<sup>48</sup> and constitutional provision,<sup>49</sup> prosecutors are charged with the duty

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<sup>47</sup> I note in Part II, the important but inadequate responsibility of the prosecution to ensure justice, which includes the obligation to provide exculpatory evidence. Full, open-file discovery eliminates the problems in disclosing exculpatory evidence because it requires the disclosure of all prosecution evidence, removing the need for the prosecution to decide what evidence is exculpatory, which entails a difficult decision by counsel in the adversarial system to recognize which evidence may help his or her opponent. See Mosteller, *supra* note 39, at 310 (noting the obvious "beauty" of full open-file discovery in this regard).

<sup>48</sup> With regard to ethics, the Model Code of Professional Responsibility states: The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict. This special duty exists because: 1) the prosecutor represents the sovereign and therefore should use restraint in the discretionary exercise of governmental powers, such as in the selection of cases to prosecute; 2) during trial the prosecutor is not only an advocate but he may also make decisions normally made by an individual client, and those affecting the public interest should be fair to all; and 3) in our system of criminal justice the accused is to be given the benefit of all reasonable doubts.

MODEL CODE OF PROF'L RESPONSIBILITY EC 7-13 (1980). See also "Special Responsibilities of a Prosecutor," MODEL RULES OF PROF'L CONDUCT R. 3.8 (1983).

<sup>49</sup> In terms of tradition, the Court in *Berger v. United States*, 295 U.S. 78, 88 (1935) made the following statement:

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

The Supreme Court's decision in *Brady v. Maryland*, 373 U.S. 83, 86 (1963), holds that the Due Process Clause requires the prosecution to provide potentially exculpatory evidence to the defense. Rule 3.8(d) of the Model Rules of Professional Conduct requires "timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all

not to pursue the advocate's victory for his or her side but rather to seek justice.<sup>50</sup> In theory and practice, that responsibility is one of the most important in achieving justice in the American system of criminal justice. I spent seven years as a public defender in Washington, D.C. and was privileged to practice opposite members of the United States Attorney's Office, who took this responsibility seriously. That duty is critical, but as discussed in the next section, it is inadequate for a number of institutional and practical reasons.

### *C. Suggested Reforms*

The appropriate reforms that would counter the weaknesses I have identified are obvious. They are adequate funding for indigent defense services and more complete discovery. The former may be politically/fiscally impractical.<sup>51</sup> The second reform, which would help alleviate the disparities in resources, is quite achievable and should be implemented.

The prosecutorial duty to ensure that justice is done, which has several concrete manifestations in the legal and ethical doctrine, has been noted at several points in Part I. It is obviously a deviation from the pure adversarial model, because it requires one party to provide helpful evidence to the other. This exception to the strict adversarial model could, however, at least alleviate the impact of the failures of strict adversary testing noted above. In Part II, I examine whether it does presently or can realistically be hoped to perform that function.

## **III. The Failure of the American Prosecutorial Model to Compensate for the Absence of Full Adversarial Testing**

### *A. The Awesome Power of American Prosecutors to Effectively Decide Many Cases and the Inherent*

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unprivileged mitigating information known to the prosecutor." MODEL RULES OF PROF'L CONDUCT, *supra* note 48, at R. 3.8(d).

<sup>50</sup> See MODEL CODE OF PROF'L RESPONSIBILITY EC 7-13, *supra* note 48; see also Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45, 46 (1991) (describing the responsibility as "doing justice").

<sup>51</sup> See Jessa Desimone, *Bucking Conventional Wisdom: The Montana Public Defender Act*, 96 J. CRIM. L. & CRIMINOLOGY 1479, 1488 (2006).

*Impediments in Current Institutional Design to Act as  
Neutral Judges of the Facts Consistent with their De  
Facto Role*

The recognized duty of the prosecutor in the American system “to do justice” has long been recognized as a key theoretical check to protect the innocent from potential systemic failures of the adversarial system. It may logically be advanced as a partial remedy to the particular systemic failures occasioned by inadequate defense funding and limited criminal discovery. I do not gainsay the importance of this responsibility to American criminal justice. In my judgment, this widely recognized responsibility is in fact a key to the overall operation of American justice, and it is significant in its impact. Unfortunately, as developed later in this Part, the duty is not the equivalent of effective testing by an effective adversary or a substitute for a truly independent judgment on the merits.

The relevant enforceable element of the Rule of Professional Conduct is the extremely limited requirement that “[t]he prosecutor in a criminal case [shall] . . . refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause.”<sup>52</sup> This standard requires only that the prosecution must be supported by probable cause of the defendant’s guilt, which imposes an extremely light burden of justification on the prosecutor.<sup>53</sup> Second, it requires that the prosecutor refrain from prosecuting only when the prosecutor *knows* that probable cause is lacking.<sup>54</sup> Finally, it imposes no duty of thorough inquiry into the facts and no responsibility of independent investigation.<sup>55</sup> Occasionally, the alternative standard of “sufficient evidence to

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<sup>52</sup> MODEL RULES OF PROF’L CONDUCT R. 3.8(a) (1983). The vast majority of American jurisdictions use this standard. See Mosteller, *supra* note 38, at 1367. Only the District of Columbia has a different standard. It requires that the prosecutor is not to “[f]ile in court or maintain a charge that the prosecutor knows is not supported by probable cause.” D.C. RULES OF PROF’L CONDUCT R. 3.8(b) (2007). More significantly, in the District of Columbia, the prosecutor is not to “[p]rosecute to trial a charge that the prosecutor knows is not supported by evidence sufficient to establish a prima facie showing of guilt.” *Id.* at R. 3.8(c). However, even this variation can barely be called a significant difference.

<sup>53</sup> MODEL RULES OF PROF’L CONDUCT, *supra* note 52, at R. 3.8(a).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

support a conviction” is proposed.<sup>56</sup>

The commentators who argue for a more vigorous protection of potentially innocent defendants do not generally advocate substituting an objective standard or modifying the knowledge requirement of the rule. Instead, in an apparent effort to set the aspirational duty at a high level—to emphasize the personal responsibility of the prosecutor—suggestions typically state the prosecutor’s duty in subjective terms and emphasize the necessity of the prosecutor to reach a personal, moral judgment that the defendant is guilty. Two formulations are offered. The less demanding formulation is that for the prosecution to proceed, the prosecutor should be “personally convinced of the defendant’s guilt.”<sup>57</sup> The more demanding standard would require that the prosecutor be “morally certain that the defendant is guilty and that criminal punishment is appropriate.”<sup>58</sup> The key ingredient of both formulations is not only to move beyond a forgiving objective standard but also to require some type of moral judgment by the prosecutor.<sup>59</sup> My sense is that, while there may be some difference in the effect of the two standards, the difference is not substantial, and the key is that a responsible prosecutor is directed to make a

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<sup>56</sup> The United States Attorneys’ Manual effectively adopts the first of the two alternative standards set out above. It mandates that a federal prosecutor should commence or recommend prosecution only “if he/she believes that the person’s conduct constitutes a Federal offense and that the admissible evidence will probably be sufficient to obtain and sustain a conviction.” See U.S. ATTORNEYS’ MANUAL § 9-27.220(A) (2007), available at [http://www.usdoj.gov/usao/eousa/foia\\_reading\\_room/usam/title9/27mcrm.htm#9-27.220](http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/27mcrm.htm#9-27.220).

The reason a trial-related burden is used in making the charging decision is explained by the comment to this section, which is captioned “Grounds for Commencing or Declining Prosecution.” The comment explains that, “both as a matter of fundamental fairness and in the interest of the efficient administration of justice, no prosecution should be initiated against any person unless the government believes that the person probably will be found guilty by an unbiased trier of fact.” *Id.* § 9-27.220(B) cmt. The U.S. Attorneys’ Manual is an important internal directive by the preeminent prosecutor’s office in the United States.

<sup>57</sup> Bennett L. Gershman, *The Prosecutor’s Duty to Truth*, 14 GEO. J. LEGAL ETHICS 309, 338 (2001) (describing the standards suggested for the prosecutor’s “duty to prejudge truth”).

<sup>58</sup> Bennett L. Gershman, *A Moral Standard for the Prosecutor’s Exercise of the Charging Discretion*, 20 FORDHAM URB. L.J. 513, 524 (1993).

<sup>59</sup> See *id.*; Gershman, *supra* note 57, at 338.

personal judgment regarding the defendant's guilt.

A third non-objective formulation, which on its face requires the least of the prosecutor, introduces the important procedural requirement of mandating a commitment to a neutral evaluation. The late Professor Richard Uviller argued that the prosecutor can prosecute a case without a personal belief in the defendant's guilt if the evidence would permit a jury to fairly find either way, letting a jury decide guilt or innocence.<sup>60</sup> However, though his aspirational standard is the least demanding, he requires an additional component describing the necessary perspective in the charging decision as the "mindset of the true skeptic, the inquisitive neutral."<sup>61</sup> One deficiency of Uviller's proposal is that without a duty of independent evaluation, which will include a systematic re-examination of the facts and often independent investigation of them, avoiding prosecution of the innocent is impractical and likely impossible. Unfortunately, the American system of prosecution, as it is presently structured, prevents the effective exercise of such processes.

All of the standards require enhanced review of cases by the prosecutor, which would provide benefits. A moral judgment by the prosecutor that the defendant is guilty is an important protection, but to provide significant protection to the innocent, it must be supplemented by careful factual analysis. However, as discussed in the next subsection, the utility of such factual analysis is undercut when performed by the individual who serves as the advocate for the prosecution.

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<sup>60</sup> See H. Richard Uviller, *The Virtuous Prosecutor in Quest of an Ethical Standard: Guidance from the ABA*, 71 MICH. L. REV. 1145, 1159 (1973). However, if "from all he knows of the case, [the prosecutor] believes that there is a substantial likelihood that the defendant is innocent of the charge, he should, of course, not prosecute." *Id.*

<sup>61</sup> H. Richard Uviller, *The Neutral Prosecutor: The Obligation of Dispassion in a Passionate Pursuit*, 68 FORDHAM L. REV. 1695, 1704 (2000). Although his definition of its scope is inadequate, Uviller would also require some limited measure of independent investigation of the facts. He argues that the "alert prosecutor" will not automatically process what the police officer presents as ready for bringing charges. "At the very least, the complainant should be interviewed first hand." *Id.* at 1703.

*B. The Impediments to Prosecutors to Playing the Role of Neutral Evaluators of the Merits of a Criminal Case*

Professor Rachel Barkow has written a very insightful article that provides a broad theoretical critique of the American justice system as practiced in federal criminal cases and particularly the failures in the design of the prosecutor's office. In *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*,<sup>62</sup> Barkow develops how the prosecutor has come to exercise awesome powers in the federal criminal justice system. In a system where only one in twenty cases goes to trial, prosecutors are not only law enforcers, but also the *de facto* final adjudicators of nearly all cases.<sup>63</sup>

The prosecutor's power, which has historically been substantial, has been intensified by a series of legal developments that have magnified it under the expanding reach of federal criminal law. For example, the prosecutor controls the charging decision and, given the overlapping nature of many federal criminal statutes, often has available the choice of charges carrying a range of sentences, including mandatory minimum sentences for some of the crimes.<sup>64</sup>

The overall result is that for most defendants in the federal criminal justice system, going to trial is too risky,<sup>65</sup> and the prosecutor therefore controls the terms of the resolution of the case through the guilty plea offered and "accepted" by the defendant.<sup>66</sup> In the process, the federal prosecutor has effectively become not only the responsible law enforcement officer, but also the chief

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<sup>62</sup> See Barkow, *supra* note 34. As Barkow acknowledges, her insights benefit from and share the core ideas of scholarship held by Judge and Professor Gerard Lynch. See Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 *FORDHAM L. REV.* 2117 (1998).

<sup>63</sup> See Barkow, *supra* note 34, at 871.

<sup>64</sup> See *id.* at 876–77; see generally Stuntz, *supra* note 46 (describing how legislative and prosecutorial interests have constantly pushed an expansion of federal criminal law jurisdiction that makes convictions easier to achieve and punishments potentially harsher and thereby expands the effective power of the federal prosecutor).

<sup>65</sup> See Barkow, *supra* note 34, at 879–80 (referencing the practical implications of the Supreme Court's decision in *Bordenkircher v. Hayes*, 434 U.S. 357 (1978), which held that "the Constitution does not prohibit prosecutors from threatening defendants with more serious charges if they exercise their trial rights.").

<sup>66</sup> See *id.* at 877–82.

adjudicator of the facts and frequently the resulting punishment.<sup>67</sup> Barkow recognizes that combining investigative and adjudicative power in criminal law in one actor is troubling for a number of reasons. Among these is an intuitive difficulty inherent in allowing the actor who participates in the investigation and decides to pursue charges to be the same actor who impartially judges those facts.<sup>68</sup>

Her proposed solution is, having recognized that the investigative and adjudicative roles have been combined, to apply the principles of administrative law, which have been developed to manage administrative agencies that explicitly combine investigative and adjudicatory functions. The principal protection is an explicit and clear separation of the two functions by assigning them to different groups of employees within the agency.<sup>69</sup>

With regard to the tasks entrusted to each group within the prosecutor's office, Barkow proposes to treat as adjudicative the decisions to charge, to offer or accept a plea deal, and to recognize that the defendant provided substantial assistance.<sup>70</sup> She considers the decision to file a notice of substantial assistance difficult to categorize as investigative or adjudicative but ultimately decides it is adjudicative.<sup>71</sup> She balances this decision somewhat by treating as investigative the related decision on whether to enlist a defendant as a cooperator in the first place.<sup>72</sup> Under her division of responsibility,

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<sup>67</sup> See *id.* at 871, 882–83, 887.

<sup>68</sup> See *id.* at 883. Barkow identifies a number of reasons for this difficulty. One is the difficulty of admitting that effort invested in developing the case was wasted. Another is the self-interest in advancing within the office by pointing to a high success rate. She also notes that when the same actor makes both decisions it creates greater opportunity for biases and prejudices to dictate ultimate outcomes. *Id.*

<sup>69</sup> See *id.* at 888–89. An additional protection used in administrative law is some external review of agency decisions. *Id.* at 893–95. Barkow does not propose prosecutorial reforms that are analogous to outside review used in administrative law, concluding that, while it might be theoretically sound, she believes it is impractical. *Id.* at 907–09. She rejects other suggested remedies, such as limiting the prosecutor's discretion as to plea bargain and charging, for the same reason. *Id.* at 909–13.

<sup>70</sup> See *id.* at 898–900.

<sup>71</sup> See *id.* at 899.

<sup>72</sup> Barkow, *supra* note 34, at 899.



[n]either the Assistant U.S. Attorney (AUSA) responsible for investigating or overseeing the investigation of a case or for representing the United States in court (either at trial or in pretrial proceedings) nor any individual who has directly supervised the AUSA in the investigation or courtroom decisions should be the same individual who makes the final determination of what charges to bring, what plea to accept, or whether an individual has cooperated sufficiently to merit a lesser sentence on the basis of giving substantial assistance to the government. Rather, a different prosecutor or panel of prosecutors who were not involved in the investigation (as either a line attorney or a supervisor) should make these adjudicative decisions.<sup>73</sup>

Although Barkow believes that a panel of prosecutors representing a broad range of viewpoints is preferable to a single individual making adjudicatory decisions, she recognizes and accepts that resource constraints in smaller offices could dictate the use of a single attorney.<sup>74</sup>

In an earlier article, I examined the failure of the North Carolina criminal justice system to provide justice to Lee Wayne Hunt.<sup>75</sup> He is serving a life sentence in prison after a wrongful conviction based exclusively on the testimony of informants who received substantial benefits for their incriminating testimony.<sup>76</sup> The targeted reform I recommended, for cases that rely critically on informant testimony, is based on the same basic concept that Barkow develops for the federal system generally. I argued that the merits of the prosecution should be reviewed, both before trial and upon post-conviction challenge, by a group of prosecutors who are at least independent of the investigating prosecutor and preferably independent of the office that handled the prosecution.<sup>77</sup> I termed this a “fresh look” at the evidence by prosecutors who had not committed themselves through their prior actions to the

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<sup>73</sup> *Id.* at 901.

<sup>74</sup> *See id.*

<sup>75</sup> *See* Robert P. Mosteller, *The Special Threat of Informants to the Innocent who are not Innocents: Producing “First Drafts,” Recording Incentives, and Taking a Fresh Look at the Evidence*, 6 OHIO ST. J. CRIM. L. 519, 528-48. (2009).

<sup>76</sup> *See id.*

<sup>77</sup> *See id.* at 573-77.

merits of the prosecution.<sup>78</sup>

Barkow's broader proposal and my more targeted and limited approach each proceed from the same basic judgment that a prosecutor who has actual responsibility for prior decisions in a case as well as the potential responsibility for its prosecution will find it difficult, if not impossible, to conduct a reasonably fair evaluation of the evidence.<sup>79</sup> While I do not object at all to Barkow's proposal, I did not adopt it generally for a number of reasons.<sup>80</sup> She contends that her proposed reform would be realistic in even the smallest U.S. Attorney's Office, which has eleven Assistant United States Attorneys,<sup>81</sup> and that it is politically

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<sup>78</sup> See *id.* at 573-74.

<sup>79</sup> See *id.* at 573.

<sup>80</sup> I put great emphasis in my proposals regarding reforms applicable to informants generally on practicality. See *id.* at 563 (noting the difficulty has not been with developing sound and innovative proposals but with making them manageable and implementing them). I also chose to focus on the review of charging decisions and investigation when challenged after conviction in particular. See *id.* at 574 (recognizing that selecting review committee members from the ranks of seasoned prosecutors may bias the decision in favor of supporting the prosecution but going outside trusted ranks would mean review would be unlikely). Barkow similarly worries that using prosecutors who sometimes perform the task of investigator or advocate may bias the decision despite their separation from such decisions in the case under review. See Barkow, *supra* note 34, at 902.

Obviously, the greater the independence and the more definite the separation from the prosecution, the more independent and neutral the evaluation is likely to be. A recent example implementing the proposed model involved the independent review of the investigation conducted and charges brought by the Durham County District Attorney's Office in the Duke Lacrosse case by members of the North Carolina Attorney General's Office. That independent review resulted in a dismissal of the charges and the declaration that the defendants were innocent, coupled with a condemnation of District Attorney Mike Nifong's actions. See Mosteller, *supra* note 38, at 1337-38 (describing news conference statement by North Carolina Attorney General Roy Cooper). By contrast, the same veteran prosecutor from the Attorney General's Office who helped to exonerate the lacrosse players chose to re-prosecute Alan Gell, another North Carolina case, whose innocence was strongly suggested. In Gell's case, however, special prosecutors from the Attorney General's Office had conducted the initial flawed prosecution. See Mosteller, *supra* note 39, at 265, n.31 & 266, n.34. Whether the lack of separation in the Gell case between the office responsible for the original prosecution and the outcome of the review decision, despite the fact that the original prosecutors had by the time of the re-prosecution left the office, cannot be known, but it is the type of factor that might well have influenced the decision. *Id.* at 266.

<sup>81</sup> See Barkow, *supra* note 34, at 901.

viable within the federal system.<sup>82</sup> I hope she is correct on its political viability, but I have my doubts that it will be generally accepted. Moreover, in the state justice systems, which are of greater concern to me than to Barkow, the model would not be practical in many offices and political acceptability is less clear given the lack of centralized structure in most states, which entrust prosecutions to largely independent, elected local prosecutors.

However, my questions and any minor disagreements I have with Barkow on the shape of reform are beside the point to her central critique of the American adversary system, which is both powerful in its implications and clearly accurate. I believe there may be significant differences between the United States Attorney's Offices, the United States Department of Justice, and federal criminal law on the one hand, and state prosecutor operations with differing state legislation and resources on the other hand. Despite these important differences, there is great commonality throughout American criminal justice operations regarding the enormous power of prosecutors to secure guilty pleas and the infrequent nature of trials because of the threat of enhanced punishment upon conviction. On these broad features, the federal and state systems are fundamentally equivalent. Prosecutors are presently the chief adjudicators of the guilt and punishment of defendants regardless of where the case arises. And in every system, the person in charge of the prosecution cannot reasonably be expected to adjudicate the defendant's case fairly as well.

The American adversarial model is seriously flawed in its failure to provide an adequate adversarial testing and adjudication in the vast majority of cases. This is the consequence of the failure to provide a true adversarial system, and the prosecutor's mandate to ensure that justice is done cannot compensate for that failure. Moreover, the effective addition of adjudicatory responsibilities to the investigative and prosecutorial functions makes the inherent adversarial perspective even more damaging. I now turn to documentation about the psychological roots of the adversarial perspective.

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<sup>82</sup> See *id.* at 913–21 (noting that similar practices are currently used in a number of the larger offices).

*C. The Depth and Nature of the Impediment to Accurate Neutral Evaluation by the Person Entrusted with the Duties of Investigating and Prosecuting a Criminal Case*

A fascinating article by the Professor Barbara O'Brien, *A Recipe for Bias: An Empirical Look at the Interplay Between Institutional Incentives and Bounded Rationality in Prosecutorial Decision Making*,<sup>83</sup> adds great insight on why the recognized problem that prosecutors are not and cannot be expected to be fair adjudicators has such strength and persistence. O'Brien adds lessons from social psychological research generally and from her own empirical findings to the legal commentary about this problem.

Her beginning point is a set of cognitive biases, which are defined as ways in which humans systematically and predictably diverge from perfect rationality in their decision-making and judgments.<sup>84</sup> The core concept at issue with prosecutors is "confirmation bias," which is the "inappropriate bolstering of hypotheses or beliefs whose truth is in question."<sup>85</sup> One way this problem arises is through the "primacy effect," which occurs when someone "forms an early opinion and subsequently evaluates new information received in ways supporting the original opinion."<sup>86</sup>

O'Brien also observes that prosecutors have motivations of varying intensities at different stages of a prosecution.<sup>87</sup> Once the prosecutor has decided to proceed with a prosecution, the constant motivation not to convict an innocent person is ordinarily swamped by the motivation not to fail in the prosecution, which would likely be viewed negatively by superiors conducting job evaluations.<sup>88</sup> A dismissal or acquittal, even if appropriate because the defendant is judged innocent, theoretically undercuts the goal of deterring other criminals since the decision will likely be

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<sup>83</sup> Barbara O'Brien, *A Recipe for Bias: An Empirical Look at the Interplay Between Institutional Incentives and Bounded Rationality in Prosecutorial Decision Making*, 74 MO. L. REV. 999 (2009).

<sup>84</sup> *Id.* at 1011.

<sup>85</sup> *Id.* (quoting Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. OF GEN. PSYCHOL. 175, 175 (1998)).

<sup>86</sup> O'Brien, *supra* note 83, at 1011.

<sup>87</sup> *See id.* at 1013.

<sup>88</sup> *See id.*

perceived by the public as a prosecutorial failure.<sup>89</sup> Moreover, the dismissal is not always linked to the successful prosecution of another individual, and it may not result in eventually solving the crime and holding someone responsible.<sup>90</sup>

The prosecutor also faces “cognitive dissonance” as a psychological deterrent to even entertaining doubts about the guilt, typically a necessary first step to an effective reevaluation.<sup>91</sup> As the prosecutor encounters a piece of evidence that might be viewed as exculpatory, no conflict between belief and continued prosecution is created if the evidence is considered or explained away as consistent with guilt, but if it is actually believed as possibly contrary to guilt, then the inconsistent continued prosecution becomes uncomfortable.<sup>92</sup>

O’Brien’s central insight adds depth in the form of a psychological foundation for the difficulty that a prosecutor faces in neutrally evaluating the case.<sup>93</sup> The basic psychological

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<sup>89</sup> See *id.* at 1010.

<sup>90</sup> See *id.* at 1013.

<sup>91</sup> See *id.* at 1014.

<sup>92</sup> See O’Brien, *supra* note 83, at 1014–15.

<sup>93</sup> See *id.* No doubt, if further examined, other psychological mechanisms may explain the power and the depth of the difficulty humans have with evaluating fairly new information and altering the positions held before that new information was received. See Monica Prasad, “There Must Be a Reason”: *Osama, Saddam, and Inferred Justification*, 79 SOCIOLOGICAL INQUIRY 142 (2009). Professor Prasad and her colleagues noted that when asked about the connection between the invasion of Iraq and the 9/11 terrorists, which data presented indicated did not exist, most respondents who held the position that there was a connection engaged in one of three types of long-identified strategies to resist persuasion by the new information—“counterarguing (direct refutation), attitude bolstering (supporting one’s position by other facts rather than directly confronting the new data), selective exposure (ignoring the contradictory data rather than directly refuting it or offering further support for the initial position with different data).” *Id.* at 152–55 (citing a study by Julia Jacks and Kimberly Cameron, *Strategies for Resisting Persuasion*, 25 BASIC AND APPLIED SOCIAL PSYCHOLOGY 145, 145–161 (2003)). To those, her research findings indicate that two others were articulated: “disputing rationality (maintaining that positions do not have to be entirely rationally grounded in facts or reasoning), and most interestingly, inferred justification (inferring evidence that would support the initial position under the logic that it must exist because the position is sound),” Prasad at 152, 155–57.

Prasad explains that “[i]nferred justification operates as a backward chain of reasoning that justifies the favored opinion by assuming the causal evidence that would support it.” *Id.* at 155. She concludes that the implications from their research may be that misinformation about a connection between the 9/11 terrorists and Iraq did not lead

phenomenon is a form of confirmation bias—defensive bolstering that occurs due to the nature of the prosecutor's ultimate task, if the case proceeds to trial, of presenting an effective advocate's case to the finder of fact.<sup>94</sup> General psychological research has shown that the willingness to acknowledge weaknesses in a position is diminished for those who are rewarded for their ability to persuade others of their position.<sup>95</sup> This unconscious psychological tendency impedes their efforts to evaluate the evidence supporting the position in an even-handed fashion.<sup>96</sup>

Moreover, defensive bolstering can undermine a basic counterbalance to error provided by the threat of accountability for an erroneous decision. Unfortunately, when accountability for error comes after the information has been received and a decision reached, balanced and thorough reasoning does not follow, and the psychological response is defensive bolstering.<sup>97</sup>

O'Brien adds her own experimental research to the recognized general psychological impediments to neutral evaluation by a prosecutor.<sup>98</sup> She designed one of the tasks to track the basic task of a prosecutor in what is known as a vertical system of prosecution. A vertical system of prosecution is a system in which prosecutors initially evaluate the case to determine whether the defendant should be charged and then have the responsibility of presenting the case to a judge or jury if it goes to trial.<sup>99</sup>

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to support for the Iraq war but the other way around in that support for the war led to misperception of the facts. Moreover, such reasoning "may be *strongest* when stakes are the *highest*." *Id.* at 159.

The inferred justification mechanism has rather obvious potential application to why investigators and/or prosecutors may continue to maintain the position that a suspect is guilty and ignore or disregard contrary new evidence. It and the other psychological mechanisms identified provide explanations and have implications regarding the prospects for disclosure of potentially exculpatory evidence as required by *Brady v. Maryland*, 373 U.S. 83 (1963). It is possible that the prosecutor may never perceive some evidence as exculpatory, or he or she may unconsciously withhold that evidence due to his or her deeply held position.

<sup>94</sup> See O'Brien, *supra* note 83, at 1004.

<sup>95</sup> See *id.*

<sup>96</sup> See *id.* at 1028.

<sup>97</sup> See *id.* at 1019.

<sup>98</sup> See *id.* at 1027, 1028.

<sup>99</sup> In two studies O'Brien randomly assigned students to one of several conditions. See *id.* at 1027, 1028. The design of both studies required the students—who had

O'Brien finds confirmation of a fascinating, expected conclusion.<sup>100</sup> In answering a set of questions about the file, test subjects who had been told that their ultimate task was to persuade remembered as true more facts consistent with guilt and fewer

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different purported purposes—to read a case file and answer questions regarding it before they reached the point of performing their assigned task. *See id.* at 1027-28. The subjects in the first study were given instructions that defined the ultimate task as focused on persuasion, process, or outcome. *See id.* at 1027.

In the persuasive condition, the task, which is most related to that of the prosecutor, instructed participants that their assignment would be to give a persuasive presentation on the file. *Id.* at 1027. In this condition, study subjects were instructed:

This study has two parts; you are participating in part 1. Your job is to figure out what happened and to formulate a brief argument (about 5 minutes) that would persuade a jury of your position. To do this, as you review the evidence, think about the argument you will present to me in a tape-recorded interview. This tape will later be played to the participants in the second part of the study and rated for how persuasive it is. *Id.*

In the "process" condition, the study instructed participants that their ultimate task was to respond by evaluating the file and explaining at the end the reasoning process and strategies they used in reaching their conclusion. *Id.* These subjects were instructed:

As you know, the case materials you are about to read are from a real case. At the time of the investigation, the police department was especially concerned about the accuracy of its investigations; that is, were its detectives using the investigatory techniques best suited for finding the truth? The department therefore brought in a consultant to advise them about the correct procedures to maximize the detectives' chances to get at the truth and to review the detectives' work. This consultant is the best in his field and has advised some of the biggest departments in the country, including the FBI. We are interested in how well your investigatory decisions match the procedures he advocates. We're not so much concerned about the outcomes of your strategies but in the information you considered in formulating those strategies in reaching your conclusion. Therefore, at the end of the experiment, we will briefly interview each of you about your responses and judgments. *Id.* at 1027-28.

A third group, which was focused on the best outcome, was instructed:

We are interested in whether you figure out *who* did this crime and *how* exactly it happened. As you know, the case materials you are about to read are from a real case. This case has already been to trial and considered by a judge and jury. To measure how accurate you are, we will compare your judgments about what happened to the conclusions reached by the judge and jury. To do this, we will briefly interview each of you at the end of the experiment and conduct further analysis on your tape-recorded responses to see whether you succeeded in figuring out what happened. *Id.*

Those in the control condition were simply told to read the file and answer questions without any particular objective being noted. *Id.* at 1027.

<sup>100</sup> *See* O'Brien, *supra* note 83, at 1028, 1031.

facts consistent with innocence, as compared with the control groups.<sup>101</sup> They also interpreted ambiguous or inconsistent information more consistent with the suspect's guilt.<sup>102</sup>

O'Brien's work—an exploration of general psychological motivations that negatively influence the ability of prosecutors to act neutrally when evaluating cases where they are charged with the responsibility of serving as advocates—provides strong support for forms like those advocated by Barkow (and me). O'Brien's work develops further arguments for why such separation of responsibilities is not only justified as a matter of legal scholarship, but also as a matter of documented human psychology that is often outside conscious control.

#### *D. Proposed Reform*

As noted earlier, Professor Barkow is accurate in her overall assessment of the transformation of the American criminal adjudication process to one where the prosecutor frequently acts as both chief advocate and final adjudicator, whether the focus is federal or state prosecutions. While there may be various formulations of a key remedy, the central feature of reform should be clear and practical because it should be done within either the prosecutor's office or within a community of prosecutors. The central feature is that a review should be conducted of all cases—or, in the alternative, of identified classes of problematic cases—by individuals who do not have the responsibility to prosecute the case.

Whether this form of the remedy will prove adequate is subject to debate, but whether or not prosecutors' offices should attempt to implement it in some form should not be. Barkow specifically notes that some of the larger United States Attorney's Offices already operate in a design that is helpful in separating functions by assigning the charging decision to a separate, sizeable group of attorneys who are independent from those attorneys who would be given the task of presenting the case to a jury if the case were to proceed.<sup>103</sup>

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<sup>101</sup> See *id.* at 1031, 1049-50, n.201.

<sup>102</sup> See *id.* at 1029.

<sup>103</sup> See Barkow, *supra* note 34, at 915-17 (giving examples of United States Attorneys' offices that prosecute crimes independent of authorities that make charges).



#### IV. Suggested Implications for the Comparison between the Adversarial Model and the Inquisitorial Model in Professor O'Brien's Research

Professor O'Brien did not examine the implications of her research for different systems of justice on an international level; she focused on the American adversarial system. However, concerns about institutional design for, and the role definition of, those who investigate, prosecute, and adjudicate crimes—and the impact of that design on effectiveness and accuracy—have implications for both differences within national systems and across international systems for comparative law purposes.

O'Brien focuses on the person with the ultimate task assignment and on the psychological impact that the task has on that person's perception and memory of the facts unearthed. Her insights relate quite directly to the accuracy of the investigative result. This basic instinct animates my suggestion in *The Special Threat of Informants to the Innocent*<sup>104</sup> of a "fresh look" at the evidence before trial by largely independent reviewers in cases that critically depend on informant testimony, a recognized suspect category of evidence in American prosecutions.<sup>105</sup> More generally, Barkow employs insights from administrative law to suggest reform of the institutional design of federal prosecutors' offices based on the structure and separation of different types of functions in administrative agencies.<sup>106</sup> She applies these lessons and recommends the separation of functions between those that are essentially prosecutorial and those that are fundamentally adjudicative, such as evaluating the evidence gathered to make a charging decision.<sup>107</sup> O'Brien's research buttresses the instincts that animate these reforms and sharpens their focus. Given the renewed focus on accuracy with specific emphasis on innocence in the American criminal justice system, her research has special

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<sup>104</sup> Mosteller, *supra* note 75 (employing shortened title).

<sup>105</sup> *See id.* at 573–74 (arguing that, when informant testimony provides the only direct evidence of guilt, an examination of the evidence supporting guilt be conducted by prosecutors who have no direct involvement in the current prosecution). I also argue that where substantial evidence has been discovered after conviction, independent review should be required. *See id.* at 574–76.

<sup>106</sup> *See* Barkow, *supra* note 34, at 895–906.

<sup>107</sup> *Id.*

salience. It also clearly has important implications for the general question of the comparative advantages of the adversarial and inquisitorial systems.<sup>108</sup>

Certainly, other researchers, including noted comparative scholar Professor Mirjan Damaška, have recognized the potential connection between accuracy in the criminal process and the psychological impacts of an adversarial approach to fact investigation.<sup>109</sup> Indeed, Damaška observed the adversarial system's potential to bias the development of the facts in an unconscious way in an article he published over thirty years ago, albeit suggesting a different type of bias.<sup>110</sup> He also recognized the potential significance of emerging social psychology and empirical research insights with respect to comparative law and its lessons for institutional design improvement.<sup>111</sup>

The adversarial and inquisitorial methods of procedure affect various elements of the process—the investigatory stage, the charging decision, and the trial—and each of these can be examined. Often the focus of academic analysis is at the end of the process—the trial—with emphasis on two areas: the implications of different types of decision-makers and roles for

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<sup>108</sup> The issue that I identify here—the theoretical superiority of the inquisitorial judge in the investigation process because of a neutral orientation to conviction—may be seen as either a very significant issue or a minor one. The reason it would be considered significant or even fundamental is that, if the neutral perspective of the investigator inherently biases the fairness of the process that cannot be corrected by the adversarial mindset of the American prosecutor, then the other strengths of the adversarial model cannot necessarily compensate. On the other hand, it may be minor for several reasons. One is that there are many potential advantages of the inquisitorial model that would seem more important at a superficial level (although because not operating at an unconscious level they may perhaps not be as impervious to correction). Another is that the inquisitorial investigative judge is being marginalized and subject to calls for abolition in the national systems where it currently exists. See Jérôme de Hemptinne, *The Creation of Investigating Chambers at the International Criminal Court: An Option Worth Pursuing?*, 5 J. INT'L CRIM. JUST. 402, 403 (2007) (arguing, despite the questioning of the use of the inquisitorial investigative judge in national systems, that it has important advantages if properly structured for the International Criminal Court).

<sup>109</sup> See generally Mirjan Damaška, *Presentation of Evidence and Factfinding Precision*, 123 PA. L. REV. 1083 (1975) [hereinafter *Presentation of Evidence*] (explaining how the psychological tendencies of both witnesses and decision makers contribute to fact finding).

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

evidentiary barriers erected,<sup>112</sup> and the variations in how the evidence is presented. In *Presentation of Evidence and Factfinding Precision*,<sup>113</sup> Damaška concentrates mostly, with regard to the inquisitorial system, on the interaction between the active role at trial of inquisitorial trial judges in developing the evidence, and the direct involvement of the judge in presenting it, which is the necessary concomitant of that active judicial role.<sup>114</sup> This means that before the inquisitorial judge has reached a decision in the cases, he or she has at least some involvement in selecting the evidence to be used, which has an obvious potential to bias his or her subsequent adjudicatory decision.<sup>115</sup>

Damaška develops a parallel treatment of the adversarial system and its compensating disadvantage of bias operating in a different direction.<sup>116</sup> He notes that when advocates develop and select the evidence for presentation at the trial, they elicit testimony by narrowly focused questions that may distort the testimony.<sup>117</sup> However, this system keeps the factfinder, who is passive, out of the process and, therefore, unbiased, which is not possible for the active inquisitorial factfinder who must become knowledgeable of the facts to present them.<sup>118</sup>

Damaška also explored some implications of social science research—a field that was much less sophisticated then than it is

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<sup>112</sup> This aspect of the picture is Damaška's primary subject of inquiry in *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*. See Damaška, *supra* note 6.

<sup>113</sup> *Presentation of Evidence*, *supra* note 109.

<sup>114</sup> *Id.*

<sup>115</sup> See *id.* at 1088–90. Although some theoretical versions of a pure inquisitorial system might have a single inquisitorial judicial officer involved in charging, investigating, prosecuting, and judging a case, no European country has such a system and likely none in the contemporary world would ever invest these responsibilities in the same person. While inquisitorial judges of some description are trial judges, investigating judges, and prosecuting officers in typical inquisitorial systems, the same person does not both investigate the case and serve as a decider of guilt. See E-mail from Jacqueline Hodgson, *supra* note 35. However, as noted above, the judge who is a decider of guilt, frequently has some role, albeit a much more limited role, in developing facts for the trial, which role, even though limited, is in clear contrast to the complete hands-off approach of adversarial judges regarding to active fact development.

<sup>116</sup> See *Presentation of Evidence*, *supra* note 109, at 1093–95.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

today—regarding the advantages of adversarial versus non-adversarial presentations of evidence on the accuracy of the decision rendered.<sup>119</sup> Research suggested that with unbiased judges, the presentational method had no effect, but with biased judges, the non-adversarial presentation had a significantly higher number of findings of guilt.<sup>120</sup> This research on its face supported the superiority of the adversarial system.<sup>121</sup> However, that was not Damaška's view.

Damaška instead took a broader view than just the impact of the type of presentation—adversarial or non-adversarial—on the factfinder.<sup>122</sup> He noted that the two systems also had major impacts in biasing the actual development of the evidence,<sup>123</sup> which he termed “more important costs” of the development of evidence through the adversarial system.<sup>124</sup> That is the “damage to testimony inflicted by the preparation of witnesses,” focusing on “the damage of interrogation to memory images.”<sup>125</sup> Distortions resulting from inadequately prepared testimony could be greater than the negative effects of adversarial witness interviewing and preparations and could outweigh the advantages of inquisitorial process in presenting evidence, or in the factfinder's neutrality, but Damaška's insight remains invaluable. He obviously could not yet have benefited from the research findings of the type that O'Brien has developed. However, his instincts were sound in noting three points: first, the impact that characteristics of the adversarial model can have on the accuracy of fact gathering; second, the more obvious impact that a judge actively presenting evidence at trial has on that judge as a neutral factfinder; and third, the

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<sup>119</sup> See generally, *id.* at 1095-1100 (describing and critiquing research findings by Professors Thibaut, Walker, and Lind, *infra* note 120).

<sup>120</sup> See *id.*; see also John Thibaut, Laurens Walker & E. Allan Lind, *Adversary Presentation and Bias in Legal Decisionmaking*, 86 HARV. L. REV. 386 (1972) (suggesting that their experimental research lends credence to the claim that adversary presentation can combat bias).

<sup>121</sup> See Thibaut et al., *supra* note 120.

<sup>122</sup> See *Presentation of Evidence*, *supra* note 109, at 1093.

<sup>123</sup> In this treatment, he refers to the “darker view of the cathedral” that “is seldom illuminated.” *Id.* He also refers to “important cognitive costs” of the adversarial system. *Id.*

<sup>124</sup> *Id.* at 1094.

<sup>125</sup> *Id.*

potential value added by augmenting innovative legal and systems analysis with empirical social science research. Particularly in the first element—the impact of system design on accuracy of investigative efforts—the difference in assessment of facts resulting from the more neutral perspective of the inquisitorial judge, charged with supervising the investigation,<sup>126</sup> contrasted with the adversary system, entrusting responsibility largely with partisans and particularly with the partisan prosecutor, logically should matter in outcomes.

While Professor Damaška was forced to speculate as to the impact of adversarial motivation on the accuracy of fact development, O'Brien's research not only directly tests that impact, but also examined the utility of "accountability" mechanisms to counteract such bias.<sup>127</sup> Rather than always being useful in reducing bias, "the wrong kind of accountability can amplify. . . [the bias]."<sup>128</sup>

Professor O'Brien's research findings can be used to speculate further on ways to improve the conduct and supervision of fact development, in either the adversarial or the inquisitorial system to improve accuracy. Moreover, Dan Simon and his colleagues have explicitly made this conceptual connection and have begun exploring the implications of unconscious psychological mechanisms on fact investigations in adversarial and non-adversarial conditions.<sup>129</sup>

As to whether the adversarial or inquisitorial model is superior in factfinding, new empirical evidence supports the theoretical superiority of inquisitorial side.<sup>130</sup> The undeniable implication of

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<sup>126</sup> In the French inquisitorial system, for example, two different judicial officers, who are different from the trial judge, may be given the duty of supervising the investigation, the *juge d'instruction* and/or the *procureur*. See generally *infra* notes 132, 146–167 (discussing the French inquisitorial system broadly).

<sup>127</sup> See O'Brien, *supra* note 83, at 1018–23.

<sup>128</sup> *Id.* at 1023.

<sup>129</sup> See Simon et al, *supra* note 15 (exploring implications of investigations conducted for the purpose of what psychologists term "diagnostic strategies" versus "confirmation strategies" and to extend and confirm research involved in "coherence based reasoning" and finding superiority of a non-adversarial design).

<sup>130</sup> Professor Simon and his colleagues in other research have extended the implications of their earlier research by demonstrating that the degree of adversarial bias incorporated into the experimental design affects the degree of distortion of accuracy in evaluation in predictable directions. See *id.*

this new research is that a non-adversarial design of the basic task of investigation, all other elements being controlled, produces superior accuracy.<sup>131</sup> The results strongly suggest that the type of task assigned to American prosecutors, which is ultimately to persuade, disadvantages them in coordinating the investigation and evaluating the information and evidence developed when compared to the situation where those tasks are assigned to the inquisitorial judge who has no role in ultimately persuading the factfinder of the accused's guilt.<sup>132</sup>

I found the implications of O'Brien's research enlightening, particularly in the contemporary American environment, with its heightened commitment to avoid unjust convictions and thus to further informational accuracy in the investigation process. As a person steeped in the adversarial model as a former criminal defense attorney who relished his role and the practice within the adversary system, I found its implications suggesting the superiority of the inquisitorial investigative model intriguing.

Clearly, the implications I have described support a design advantage for the inquisitorial model. Thus, I do want to acknowledge a clear mark on that the inquisitorial side of some figurative scorer's card. However, the realistic question is, not the superiority of either the inquisitorial or adversarial model in some idealized form, but rather examination of how those systems operate in concrete forms of national justice systems.<sup>133</sup> Also, the

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<sup>131</sup> As noted earlier, the adversarial system has some potential theoretical advantages that could easily more than offset this subconscious theoretical advantage of the inquisitorial system. See Uphoff, *supra* note 18, at 781 (describing the potential advantage of the adversarial system to provide more, albeit potentially biased, investigative information to the factfinder from two motivated advocates, which is a potential advantage that the present American system squanders by woefully underfunding those representing indigent defendants who compromise the vast majority of those charged with crimes in state courts).

<sup>132</sup> In the French inquisitorial system, the *juge d'instruction* has roughly this task definition. He or she is a judicial officer who is charged with verifying the preliminary investigation and further developing evidence and evaluating it. See HODGSON, *supra* note 25, at 222-28 (discussing the role of the *juge d'instruction*). Then this judicial officer, if the case is to be carried forward, leaves the case to others to present to yet another judge who is charged with judging. See E-mail from Jacqueline Hodgson, *supra* note 35 (clarifying the French system).

<sup>133</sup> American scholars have long expressed skepticism about whether theoretical procedural advantages afforded by the inquisitorial model, and specifically the role of judicial officers in supervising investigations, actually produce superior results for the

lessons learned are more likely useful to real-world reforms within either a national inquisitorial or adversarial model than they are in judging overall superiority of the basic models.

For example, if the advocate in the American model is an Assistant United States Attorney who is skilled, independent, and ethically sensitive, the differences in perspective produced by institutional role definition of the prosecutor versus the inquisitorial judge in evaluating a file for the charging decision or developing evidence may be reduced, even though probably not eliminated. Adjustments on the inquisitorial side reducing neutrality, which will be examined below, may further narrow the difference, although perhaps not again eliminate the benefit, all other things being equal, of a more neutral definition of the ultimate goal of the individual conducting the investigation of the facts of the case.

O'Brien does not suggest that social psychologists treat all incentives as having equal power.<sup>134</sup> She recognizes that prosecutors often have conflicting motivations, and she attempts to identify the likely motivations involved and the strength of the incentives supporting various role-enforcing outcomes.<sup>135</sup> What O'Brien's research does demonstrate is that role definition as an advocate has an unconscious impact by itself on the fairness and accuracy of observation and memory of the facts encountered during the investigative process.<sup>136</sup> That is a powerful insight, and should have important implications on institutional design for all systems. However, when placed in actual national judicial systems with the complications inherent in actors having shifting roles and varied motivations flowing from personal goals and institutional incentives, the overall impact of the role definition may be muted or overcome. Even if the overall impact is

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inquisitorial system in practice. See, e.g., Abraham S. Goldstein & Martin Marcus, *The Myth of Judicial Supervision in Three "Inquisitorial" Systems: France, Italy, and Germany*, 87 YALE L.J. 240, 281 (1977) (detailing many perceived failures in the theory of judicial control to operate in actual practice and noting that "the myth of judicial control persists and has a distorting effect").

<sup>134</sup> See O'Brien, *supra* note 83, at 1010-12 (explaining the role of multiple goals and biases that influence a prosecutor's actions).

<sup>135</sup> *Id.* at 1012-14.

<sup>136</sup> See *id.* at 1029 (explaining that study participants assigned to advocate were more likely to conclude that ambiguous facts were consistent with their goal).

diminished, the importance of the insight is not eliminated. It likely affects degree of neutrality and therefore will be critical to accuracy in some cases, and it should provide guidance for adjustments in institutional structures to enhance fairness and accuracy within any structure.

In Professor Jacqueline Hodgson's book, *French Criminal Justice*,<sup>137</sup> she carefully details the operation of the inquisitorial systems in France in comparison to the adversarial system in England and Wales.<sup>138</sup> Her treatment contains both theoretical constructs and detailed institutional context,<sup>139</sup> which allows one to go far beyond the informed intuition upon which scholarship must often depend. Hodgson describes distinctions between these inquisitorial and adversarial models at a number of conceptual and practical levels.<sup>140</sup> I will examine only a few of the most salient of these.

At a conceptual level, Hodgson describes an accepted view of the accused in the French system that proceeds from a fundamental concept of the polity that is unfamiliar to the contemporary American experience.<sup>141</sup> In France, the accused "is a fellow citizen who is seen to have failed in some way, to have let down both herself and the community, and who now needs assistance in the process of reintegration into society."<sup>142</sup> This view also contrasts with that in England and Wales where defendants are not idealized and "are treated as an underclass beyond redemption."<sup>143</sup>

European inquisitorial systems generally and the French

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<sup>137</sup> HODGSON, *supra* note 25.

<sup>138</sup> *Id.* at 1.

<sup>139</sup> *See id.* at 4 (explaining the theoretical papers and studies the paper builds on by studying the actors in the system).

<sup>140</sup> *See id.* at 1 (listing several examples).

<sup>141</sup> *See id.* at 20-21 (describing the view that the state is part of the general public).

<sup>142</sup> *Id.* at 21. How much that view carries into practical difference in treatment of actual suspects is, one would expect, perhaps a different matter as Hodgson demonstrates in other elements of the French criminal justice system.

<sup>143</sup> HODGSON, *supra* note 25, at 21. I would add to the description that it applies equally in the United States, although I hope that at least many, although not all, defense counsel in the United States do not share this view as Hodgson notes is the case in her referenced jurisdictions. *See generally id.* ch. 4 (describing the role of the French defense lawyer).



system in particular define the judicial function differently than the adversarial system and select, train, and organize the judicial branch differently.<sup>144</sup> Hodgson describes characteristics of French inquisitorial judges that give context and meaning to the degree of neutrality French judicial officers exhibit.<sup>145</sup>

In contrast to England and Wales, the French definition of the judicial function is a broadly defined concept that encompasses “the trial judge, the *juge d’instruction*, and the *procureur*.”<sup>146</sup> The trial judge function is not only to pass judgment, but also to conduct further inquiries as needed to determine guilt or innocence.<sup>147</sup> Necessarily the judge adopts a more active role than in an adversarial system, the inquisitorial judge questioning witnesses and the accused, and calling for additional information from the parties beyond that provided when necessary.<sup>148</sup> The *juge d’instruction* is formally responsible for conducting the *instruction*, which “represents the paradigm model of investigation within French inquisitorial procedure.”<sup>149</sup> The inquisitorial tradition emphasizes obtaining an evaluation of all relevant information during the pretrial setting rather than at a trial and by a judge rather than by a prosecutor and defense counsel.<sup>150</sup> The *procureur*, like the American or English prosecutor, decides whether or not to seek to charge the accused with a crime after reviewing the evidence.<sup>151</sup> However, “[a]s a *magistrat[e]*, she plays a more neutral and wide ranging role than that of a simple (more partisan) prosecutor: she is a judicial officer, responsible for directing the police investigation and overseeing the detention of suspects in police custody, including the protection of their due process rights.”<sup>152</sup>

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<sup>144</sup> See *id.* at 17-18 (describing that the French view the judiciary as the function of the state, while the US and UK view it as independent).

<sup>145</sup> *Id.* at 19-20.

<sup>146</sup> *Id.* at 66.

<sup>147</sup> *Id.* at 67.

<sup>148</sup> *Id.*

<sup>149</sup> HODGSON, *supra* note 2525, at 209. Hodgson notes that, “less than 5% of cases are dealt with” through the instruction. *Id.*

<sup>150</sup> *Id.* at 222 (noting that the parties are assigned a more active role than in earlier times).

<sup>151</sup> *Id.* at 75.

<sup>152</sup> *Id.*

Both *procureurs* and *juges d'instruction* are judicial officers who direct investigations.<sup>153</sup> However, *procureurs* are much closer to the ordinary adversarial prosecutor, who supervises the police in their investigation.<sup>154</sup> The *juge d'instruction* is more in line with the image of the classic inquisitorial investigative judge who directs the investigation and develops and evaluates the dossier.<sup>155</sup> This judicial officer at least theoretically has an appropriate degree of separation from the police, has a role defined in neutral terms, and, once the assigned task is accomplished, drops out of the case.<sup>156</sup> The role of presenting the evidence at trial is left then to a prosecutor with the greater involvement of the third judicial officer, the trial judge.<sup>157</sup> The placing of the different functions in the hands of three different individuals has the potential for enhancing neutrality in perspective.

Unfortunately, as Hodgson develops in her study of the French criminal justice system, other institutional, social, cultural, and contextual factors undercut much of that theoretical

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<sup>153</sup> *Id.*

<sup>154</sup> See *id.* at 74-75 (describing the roles of the prosecutor in the English system and the role of the *procureur*).

<sup>155</sup> See Michael E. Tigar et al., *Paul Touvier and the Crime Against Humanity*, 30 TEX. INT'L L.J. 285, 295 n.79 (1995) (describing the role of the *juge d'instruction* within the judicial system).

<sup>156</sup> Before more serious cases are charged officially and tried, another level of judicial review is required. The dossier is sent to a *Chambre d'instruction* to be reviewed by a panel of appellate judges before it is tried in the *Cour d'assises*. See CATHERINE ELLIOTT, FRENCH CRIMINAL LAW 35, 44 (2001) (stating that at the end of the investigation, the *juge d'instruction*'s order "states either that there is no case to answer" because it would be inappropriate to proceed or sends the case to the Public Prosecutor who asks the *Chambre de l'instruction* to review it, referring the case to trial in the *Cour d'assises* if it finds sufficient evidence to support the charges and that the earlier procedure was complete and lawful); Renée Lettow Lerner, *The Intersection of Two Systems: An American on Trial for Murder in the French Cour d'Assises*, 2001 U. ILL. L. REV. 791, 805-06 (describing review by a panel of judges in the *Chambre d'instruction* before issuing formal charges of the dossier prepared by a *juge d'instruction* who determined prosecution warranted for a serious crime); Tigar et al., *supra* note 155, at 295 n.79 (describing generally the operation of the French criminal system).

<sup>157</sup> See Lerner, *supra* note 156, at 805 (explaining that the *procureur de la République* presents the case in court, which is approved first by the *Chambre de l'instruction*).

separation. As in many other European systems, France has a career judiciary with competitive examinations and thereafter, for those chosen, common training, high professional status, and social recognition.<sup>158</sup> Ultimately, the effect is a strong mutual allegiance shared by those within “the corps,” which she describes as resembling a family’s bond.<sup>159</sup> Presumably a similar common bond exists within the “judicial corps” of similarly selected professional judiciaries throughout the European inquisitorial tradition. Despite substantial similarities in these judicial positions, she notes one important difference between France and Germany in the membership of the corps.<sup>160</sup> In France the professional judiciary includes not only trial and investigative judges, but also public prosecutors, trial judges and public prosecutors, while in Germany these jobs are institutionally separated in significant ways.<sup>161</sup> This difference may be significant and suggests that other details regarding organization of the judiciary in the European inquisitorial systems may be important in determining the neutrality of inquisitorial judges involved in the investigative process.

She solidifies the importance of perceived membership in a “corps” that includes partisans in the process with a particularly telling quotation from a *juge d’instruction*.<sup>162</sup> This judge describes the French judiciary as having

[t]he unity of a single corps[,] which includes the functions of prosecution, of investigation and of judgment. We are the same, we come out of the same school, we know each other. That is the real problem . . . I am often shocked by the way in which people talk about certain cases before and after the court hearing. . . . I once heard a judge say, ‘but of course we must defend the police.’ . . . Even I question myself: Do I work as a judge, investigator or partner of the police and *Gendarmerie*? I do not know.<sup>163</sup>

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<sup>158</sup> See HODGSON, *supra* note 25, at 69.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> See *id.* & n.17 (describing briefly differences in the German system).

<sup>162</sup> *Id.* at 69.

<sup>163</sup> See *id.* at 70. The policing role in France is generally the responsibility of the *Gendarmerie* and the *police nationale*. See *id.* at 86-87 (explaining the historical roles of each institution).

The *juge d'instruction* who made the statement appears both extremely candid and insightful. While many American prosecutors could make this judge's final comment in a slightly different form, an American trial judge would not be likely to state it publicly. Indeed, while unexceptional if made by a career American prosecutor working in many state systems, it would be an unlikely way for most Assistant United States Attorneys to articulate their allegiances. My experience both in practice and as a faculty member is that many, perhaps most, Assistant United States Attorneys in large offices are not career prosecutors. Instead, they are recent graduates of excellent law schools on their way to lucrative jobs in the private sector after a few years both learning valuable trial skills that enhance their career and providing what they correctly perceive as important public service. As noted above, it is a statement that I believe few American trial judges would ever state publicly, although similar statements may well frequently be made in confidence, particularly by elected American judges, and held as the unexpressed sentiments of many others.<sup>164</sup>

More generally, while the separation of the judicial role into three separate components might lead to greater neutrality in the classic role of the *juge d'instruction*, that is not necessarily the result. Hodgson finds that as a result of dependence on the police and the *procureur*, the *juge d'instruction's* perspective often mirrors theirs. Consequently, the investigation is not searching or

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<sup>164</sup> There are many different types of officials who exercise judicial functions in the United States. Those who routinely handle large numbers of warrant applications presented to them by the police are no doubt likely to closely identify with the police and would likely express precisely this sentiment.

Judge Marvin Frankel described a different allegiance that is frequently common with American judges and that is to retain their identification with the partisan background of their experience in practice. See MARVIN E. FRANKEL, *PARTISAN JUSTICE* 39–40 (1980) (“[J]udges tend more than rarely to be, or to be perceived as being warmly adversarial rather than coolly detached and disinterested. When this happens, it is supposedly a deviation from the strict idea. Yet it is a direct, visible consequence of our adversary process.”). Such an identification is similar to that described by the French judge but would be much more related to the prosecutor, which is the likely career connection in most jurisdictions, than with the police, although the basic identification with the “government’s side” is quite similar. The feature common throughout this discussion is that social and professional connections may matter as much or more than theoretical constructs, but an important enduring message from the empirical research is that theoretical constructs can have an important impact on their own.

vigorous and may be more of an operation to verify the initial conclusions of the police and the fellow judicial officer, the *procureur*, who referred the case to the instruction.<sup>165</sup>

Throughout her treatment of the French system, Hodgson notes the complicated impact of reformulation of roles. For example, efforts to separate the investigative function from the judicial functions of the *juge d'instruction* has led to the transfer of power from such judges to *procureurs*, the latter group handling more serious cases while exercising less direct supervision of the police and thereby reducing the protection provided to the accused.<sup>166</sup> This is one of many complicated interactions within the French justice system that affects the actual impact of changes in the assignment of tasks to various actors and proceedings.<sup>167</sup>

I believe the central lesson from this examination of

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<sup>165</sup> See *id.* at 210 (observing the measures that *procureur* can use to guide the investigation, and that only the *procureur*, and not the *juge d'instruction*, can refer a case for investigation).

Hodgson suspects that identification with the police and with the fellow judge who previously evaluated case results in biasing the judicial officer who adjudicates guilt or innocence in favor of the prosecution. She notes that conviction rates are very high in the *Cour d'assises*, where cases are tried that have been handled in the instruction and the dossier developed and evaluated by the *juge d'instruction*, which could mean that the pre-judgment of the *juge d'instruction* continues to influence the adjudication, or might mean that only strong cases get through the *instruction* process. See E-mail from Jacqueline Hodgson, *supra* note 35.

<sup>166</sup> See HODGSON, *supra* note 25, at 71 & n.30 (detailing the reforms that took place in 2000 and in 2004 that reduced the power of the *juge d'instruction*). *Id.* at 123 (explaining that the procedures in place outside of the *instruction* are more hostile and favored by *procureur*).

<sup>167</sup> Hodgson notes that the defense function has generally been strengthened across French criminal procedure. In pre-trial investigation proceedings, that role is much more limited outside the *instruction*. *Id.* at 121. However, pre-trial defense rights are more limited in the French system because of the belief in the inquisitorial ideal and, moreover, even though the *instruction* allows for greater defense participation, defense counsel have not yet taken advantage of the opportunities given. See E-mail from Jacqueline Hodgson to the author, *supra* note 35; HODGSON, *supra* note 25, at 249 (noting that gaining greater involvement of the defense will take "more than legislative reform to alter the occupational cultures of lawyers and *magistrats*" and that even if the defense role is enhanced in the *instruction*, the vast majority of cases are supervised by the *procureur* with virtually no opportunity for defense participation). See also Uphoff, *supra* note 18, at 781 (discussing the failure of the American adversarial system to take advantage of an important potential advantage to provide more information through adversarial development of evidence helpful to the defense because of chronic underfunding of the defense function).

comparative scholarship generally and specifically from social science research and institutional design literature should go toward improving processes by adjustments within each system. In order to be effective, these reforms should be sensitive to unconscious effects of structures upon fairness and accuracy. The usable lessons will direct us in altering those structures in politically realistic ways that can be accomplished efficiently.<sup>168</sup>

These insights indicate a theoretical advantage in the basic design of the more neutral inquisitorial method of fact investigation as opposed to the partisan design of the adversarial systems, which with a chronically and significantly underfunded defense effectively puts investigative control in the hands of the prosecutor. Placed in context, these insights let us evaluate how to define tasks and roles, and help shape loyalties and incentives in ways that recognize where actual rather than theoretical loyalties may lie. This is not to reduce the significance of the new knowledge. Rather, it is to understand that in designing the role of investigator, the simple knowledge that the investigator will be expected to present his or her conclusions in a way that goes into a winning prosecution will distort accuracy. Also, those who manage criminal investigators should communicate that advancement and rewards depend on the investigator's ability, and the ability of those given the file prepared by the investigator, to judge the case accurately. Direct indications that the file will be scrutinized with regard to the fairness of the process might also enhance fairness.

These simple differences in job definition and the resulting alteration in unconscious perspective may matter critically according to O'Brien's recitation of accepted psychological

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<sup>168</sup> A specific lesson of the new research by O'Brien and others, beyond the theoretical structural advantage, it suggests the inquisitorial task design has over the adversarial model, concerns the organization of the judicial "corps." For France and other European inquisitorial systems using similar systems, the limitations on membership in the judicial "corps" used in Germany might be examined for its potential superiority in achieving investigative and adjudicatory fairness in ways not previously understood. However, there are likely offsetting theoretical concerns, matters of practicality, and questions whether such a modification, if made, would likely have any appreciable effect given the social and institutional features of the system that would remain unchanged.

learning and her experimental findings.<sup>169</sup> All other things being equal, altering the investigator's perspective would tip the balance and give them sufficient neutrality to improve the process. In the end, whether the resulting investigation will produce significantly more accurate results is impossible to know; certainly errors would continue to occur even if the reforms suggested by this research are implemented because investigators are obviously limited and imperfect human agents. However, the process should be characterized by greater procedural fairness, and fairness is one of the few universal values of criminal investigation and adjudication in all systems. Moreover, as distinct from accuracy, such procedural fairness is an attribute that systems can aspire to achieve because it is theoretically within their control through changes in institutional design.

## V. Conclusion

The American criminal justice system has much to commend. It achieves generally accurate results at relatively low costs. It also continues to operate with reasonable continuity in all sorts of political climates. However, it clearly has been shown to fail with regard to accuracy of results in a substantial number of cases, as discovered by the fortuity of the advent of DNA technology.<sup>170</sup> Moreover, there is every reason to suspect the numerous erroneous convictions that have been documented are but a small fraction of past erroneous convictions that will never be detected because no DNA evidence was found or preserved or of future unjust prosecutions for similar reasons of lack of scientific proof.

Despite its strengths, the American system neither reasonably fulfills the adversarial ideal, nor is it the best version of that ideal that is politically and economically practical in contemporary America. I note three reforms that would provide obvious improvement: more funding for indigent defense, broader discovery, and independent review within the prosecutors' office of either apparently problematic cases or all cases. The first of these is potentially costly in terms of dollars, while the other two

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<sup>169</sup> See O'Brien, *supra* note 83, at 1010-12 (explaining accepting psychological learning); *id.* at 1029 (explaining experimental findings).

<sup>170</sup> See Garrett, *supra* note 3, at 57 (stating that over 200 people have been exonerated by DNA evidence after conviction).

are not. All should be undertaken, and in their absence, the failures of our alleged adversarial model are real, important, and needlessly extensive.

Finally, all systems should learn from emerging research that notes the significance of assigning the investigative task to parties who are judged by process and fairness, rather than those who are judged by outcomes. This feature is an inherent superior characteristic of the theoretical design of inquisitorial model, and inversely, a flaw in the adversarial model. However, the true value of this basic insight, like many points learned from comparative legal analysis, is an insight that is most valuable when employed in sophisticated ways in the context of domestic systems, taking into account all their complications and complexities and focused on the task of achieving the possible.